IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-774

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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THE CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

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Respondents, American Telephone and Telegraph Company ("AT&T") and The Chesapeake and Potomac Telephone Company ("C&P"), respectfully suggest that the Petition filed herein for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied. The opinions of the Court of Appeals and of the District Court have not been reported; both opinions are set forth in the Appendix ("App.") to the Petition. Respondents submit that the decisions below are correct, and that the question petitioners present for review does not merit further consideration by this Court.

QUESTION PRESENTED

Whether telephone subscribers who are members of the news media are a special class constitutionally entitled to advance notice and a hearing when telephone companies are served with subpoenas that seek access to the companies' toll billing records pertaining to such subscribers.

STATEMENT OF THE CASE

A. The Parties

Petitioners are eleven newspaper and television reporters, one television executive, two corporations engaged in the business of publishing newspapers, and a legal research and defense fund organized to promote the interests of the working press. They commenced this suit against AT&T and C&P to challenge a policy governing the manner in which telephone companies of the Bell System (such as C&P) respond to government subpoenas seeking access to subscribers' toll billing records.[1] The United States intervened as a party defendant.

B. The Bell System Policy

Since the objective of petitioners' suit was to attack the Bell System policy, we believe the Court should have before it a more accurate description of the policy than the Petition provides.

Telephone companies maintain toll billing records in the ordinary course of business to substantiate charges made to subscribers for long distance telephone calls. These business records normally contain only the date, time, and duration of toll calls charged to the subscriber's number and the number called or, if the call is collect, the calling number. Except in rare instances, the records do not show the names

[1]For convenience, the term "subpoena" is used generically to denote legislative and judicial subpoenas and orders and administrative summonses.

of the persons making the calls or the extensions used, even when the call is person-to-person or collect. *See* the Joint Appendix filed in the Court of Appeals ("JA") at 69-71. They never record or reveal the contents of any telephone conversation.[2]

Before March 1, 1974, all Bell System telephone companies released toll billing records under subpoena; some also released such records pursuant to "demand of other lawful authority," within the meaning of Section 605 of the Communications Act of 1934, 47 U.S.C. §605. None automatically notified the subscriber when a request for records pertaining to him was received.

On March 1, 1974, a uniform written policy was adopted throughout the Bell System. JA 39-43; 93-95. The policy *prohibits* the release of toll billing records in the absence of a subpoena, valid on its face, issued under the authority of a statute, court, or Congressional or other legislative body. "Demand of other lawful authority" is no longer recognized as a basis for release of such records. The policy further requires that the subscriber whose toll billing records have been subpoenaed be automatically notified of that fact by telephone the same day (one call is made) and, in addition, by letter within 24 hours. The notification indicates who requested the records and the approximate date on which they are being furnished.

Notice is *always* automatically given within 24 hours when toll billing records are subpoenaed in civil suits, noncriminal administrative investigations, and criminal cases not involving the commission of a felony. Subscribers are also notified within 24 hours in felony and legislative investigations, *unless* the subpoena is accompanied by the

[2]Toll billing records cannot be used to identify local calls, calls from pay telephones, or long distance calls not charged to the subscriber's number. Consequently, as Judge Wilkie observed below, "it is relatively easy for subscribers to avoid recordation of their long distance calls if they desire to keep their telephonic contacts secret." App. 5a.

government's written certification stating that the subpoena was issued pursuant to a continuing investigation of a suspected felony or an official Congressional or other legislative investigation and that notification to the subscriber could impede the investigation being conducted. JA 40-42.[3] Such a certification is effective for ninety days, subject to renewal by further written certifications for successive ninety-day periods.[4]

Petitioners suggest that use of the non-disclosure certificates has resulted in abuses because certificates have accompanied about 90 percent of the subpoenas received since the Bell System policy was adopted. Petition at 3. They neglect to mention that virtually *all* of these instances have involved ongoing felony investigations, and that *none* is known to have involved a journalist. We believe these figures illustrate a different point: although toll billing records are important to the government in the investigation of the crime, there is no evidence that use of this investigative technique has had any measurable impact on journalists. This was also the view of the court below. *See* App. at 9a-15a.[5]

[3]In the case of a felony investigation, the certificate must state that disclosure of the existence of the subpoena or summons "could impede the investigation being conducted and thereby interfere with the enforcement of the law." *Id.*

[4]The policy in effect at the time of suit provided that the subscriber would be automatically notified of the subpoena when the certification expired, if he so requested or if he had previously submitted a general request for notification. The present policy provides for automatic notification within five business days after the certification period expires.

[5]Petitioners also assert that the Bell System policy was the product of "negotiations" with the Justice Department. Petition at 4, 8. However, the record shows that the policy originated solely with AT&T. JA 162. After the policy was formulated, but before it became effective, AT&T officials met with Justice Department representatives to inform them of its provisions. The government officials who attended the meeting

C. Petitioners' Complaint

Petitioners' complaint alleged five occasions when toll billing records for telephone numbers assigned to them or their news organizations were provided to law enforcement officials without prior notice to the subscriber.[6] All of these instances occurred *before* March 1, 1974, when the present Bell System policy was adopted. Petitioners did not allege —and have not subsequently claimed, despite extensive discovery — that any journalist's toll billing records have been released to any government official since this policy became effective. They also did not allege or offer evidence to prove that any government official intends to subpoena their toll billing records for any purpose, proper or improper.

Petitioners contend, however, that the Constitution entitles members of the news media to advance notice before any government investigator obtains information about them from a third party.[7] They assert that government investigators could use telephone toll billing records to identify journalists' sources, that if this happens First Amendment rights to gather news might be chilled and that, accordingly, the Fifth Amendment requires notice so the affected journalist can challenge the investigation before the

strongly *opposed* the policy, particularly as it related to the requirement of subpoenas, but were unsuccessful in their efforts to dissuade AT&T from adopting it. JA 106-116; 157 162. State law enforcement officials also opposed the policy, with similar lack of success. JA 111-112.

[6]Only five of the petitioners were involved in these instances. The remaining ten petitioners neither alleged nor offered evidence to show that toll billing records relating to them had ever been sought by any government official.

[7]Although petitioners did not bring their suit as a class action, it was nonetheless conceived as a vehicle to obtain declaratory relief on behalf of all "persons and organizations which Defendants should have reason to know are members of the news media." JA 14-15. *See also* Petition at 17.

records are supplied.[8] Petitioners' theory assumes they can obtain a declaration concerning the right to notice, and an injunction to enforce the declaration, without supplying specific evidence to demonstrate that the practice complained of has chilled sources in the past or is likely to do so in the future. They say proof of injury can be supplied after the notice has been received, in later proceedings to quash particular subpoenas that might infringe their rights.

Another curious feature of the complaint is petitioners' insistence that the notice should be provided by the telephone companies who supply the toll billing information, not the government officials who seek it. Petitioners therefore sued the telephone companies, not the Government, alleging that the telephone companies' practice of responding to government subpoenas without notifying journalist-subscribers is itself a violation of the journalists' constitutional rights. Why they adopted this roundabout procedure was never satisfactorily explained.[9]

D. Proceedings Below

In the District Court, the telephone company defendants argued that the suit could not be maintained against them because their response as private companies to subpoenas issued by government authorities does not constitute "state action." *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974). They also argued that petitioners' Fifth Amendment claim to a notice remedy must fail because petitioners had no protectable Fourth Amendment interest

[8]Petitioners also alleged that government access to telephone toll billing records might similarly violate their rights under the Fourth and Fourteenth Amendments and under unspecified "Acts of Congress providing for the protection of civil rights." JA 14. These claims were abandoned below and thus are not presented here.

[9]Petitioners now indicate they would accept notice from either the Government or the telephone companies. Petition at 19. Respondents submit that if notice must be provided, the proper party to give it is the Government.

in third party business records, *United States v. Miller*, 425 U.S. 435 (1976), or any First Amendment right to prevent disclosure of the identity of confidential sources in the context of a felony investigation. *Branzburg v. Hayes*, 408 U.S. 665 (1972). The United States, as intervenor, joined these arguments and, in addition, urged dismissal on grounds of lack of standing, lack of ripeness, and failure to state a case or controversy.[10]

On cross motions for summary judgment, the District Court ruled for the respondents and against petitioners. It held (1) that petitioners' Fourth Amendment claims had been "laid to rest" by this Court's decision in *Miller, supra*, and (2) that petitioners' First and Fifth Amendment claims were foreclosed by this Court's decision in *Branzburg, supra*. App. 4c.

The Court of Appeals affirmed the District Court's denial of petitioners' summary judgment motion, App. 70a, and the grant of summary judgment against the ten petitioners

[10]The respondent telephone companies did not raise these procedural defenses below. However, respondents did advise the District Court and the Court of Appeals that they might wish to consider whether a complaint which did not allege that any governmental official presently intended to subpoena plaintiffs' toll billing records — or that any journalist's toll billing records had in fact been subpoenaed since adoption of the current Bell System policy — stated an Article III case or controversy. *See Rizzo v. Goode*, 423 U.S. 362, 371-77 (1976); *California Bankers Association v. Shultz*, 416 U.S. 21, 67-69, 75-76 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 493-96 (1974); *Laird v. Tatum*, 408 U.S 1, 12-14 (1972); *International L. & W. Union v. Boyd*, 347 U.S. 222, 224 (1954); *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947). Respondents also suggested that, even if a case or controversy were deemed to exist, it might nonetheless be appropriate to consider whether the facts of the case were sufficiently definite to justify resolution of the important constitutional issues presented. *See Poe v. Ullman*, 367 U.S. 497, 502-03, 508 (1961); *Rescue Army v. Municipal Court*, 331 U.S. 549, 575 (1947). Respondents feel similarly obliged to advise this Court that these matters may require consideration if the Petition is granted.

who alleged no past injury to constitutional rights. App. 69a. It concluded, however, that the five petitioners who alleged past injuries "have adduced just enough evidence to withstand defendants' motion[s] for summary judgment." *Id.* The case was accordingly remanded to allow these five petitioners an opportunity to prove facts sufficient to support their claim to equitable relief. The additional facts needed are those traditionally required to justify anticipatory injunctive remedies:

> *each individual* plaintiff must show (1) that there is an *imminent threat* that the Government will subpoena his toll records in bad faith, (2) that such subpoena will cause him substantial and *irreparable harm*, and (3) that his remedy at law is inadequate. App. 68a (emphasis in original). *See also* App. at 70a-76a.[11]

Petitioners seek in this Court to renew the argument, rejected below, that journalists are constitutionally entitled to notice of all subpoenas calling for production of telephone company toll billing records pertaining to them, without specifying who must provide the notice. *See* Petition at 19. We believe petitioners' arguments are without merit, and urge denial of the Petition.

[11]The Court of Appeals found it unnecessary to determine whether the telephone company defendants had engaged in "state action" because it said they would be apprised of the existence of any injunction obtained against the United States on remand, and thus would in any event be bound to obey it under Rule 65(d) of the Federal Rules of Civil Procedure. App. 15a-18a. Respondents would, of course, obey any such injunction and, therefore, take no exception to the Court of Appeals' treatment of the state action question.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' CLAIM TO A NOTICE REMEDY IS FORECLOSED BY DECISIONS OF THIS COURT.

The broad question petitioners present for review is

> whether persons exercising First Amendment rights are entitled to reasonable notice that will permit them to seek prior judicial scrutiny of government subpoenas to third parties for business records of their transactions that identify those who assist them in exercising such rights. Petition at 2.

Petitioners assert that this issue was "expressly left open in *United States v. Miller*, 425 U.S. 435, 444 n.6 (1976)." *Id.* In fact, neither *Miller* nor any other case has ever so much as intimated that the Constitution requires prior notice of subpoenas for third party business records.

Miller itself makes clear that a person normally has no constitutionally protected interest in such records, and thus cannot object when government officials gain access to them while investigating a suspected crime. Consequently, failure to notify the person that the records have been subpoenaed is "a neglect without legal consequences...." *Id.* at 443 n.5. This point has been reiterated so often that it can no longer be said to be open to question.[12]

[12]*See United States v. Continental Bank & Trust Company*, 503 F.2d 45, 49 (10th Cir. 1974) (bank has no standing to assert constitutional rights of customers in opposition to an IRS summons served on it, and customers were not entitled to notice of the subpoena so they could intervene); *Scarafiotti v. Shea*, 456 F.2d 1052 (10th Cir. 1972) (mandamus unavailable to compel revenue agent to provide taxpayer notice of investigatory requests addressed to third parties); *Application of Cole*, 342 F.2d 5, 7-8 (2nd Cir.), *cert. denied*, 381 U.S. 950 (1965) (taxpayer could not contest IRS summons for bank records, and was not entitled to notice before it issued). *Cf. Couch v. United States*, 409 U.S. 322 (1973) (taxpayer had no Fourth or Fifth Amendment right to contest a third party summons addressed to her accountant, even when it required production of her own records); *Donaldson v. United States*,

Petitioners say their case is different because their claim rests on the First Amendment. They rely principally upon *Branzburg v. Hayes, supra,* and *Zurcher v. Stanford Daily,* __ U.S. __, 98 S. Ct. 1970 (1978). However, neither decision even remotely suggests that the notice remedy petitioners seek is constitutionally required.[13] Indeed, we think these cases conclusively demonstrate that petitioners' claims to special treatment must fail.

Branzburg held that reporters could be compelled to appear before a grand jury and answer questions relating to the identities of their news sources and the information obtained from them. Notice was not an issue because the subpoenas in *Branzburg* were served directly on the reporters, not on third parties. However, there is nothing to suggest notice would be required where third party subpoenas are used. To the contrary, the Court stated that a reporter could not object if the authorities independently identified his sources. 408 U.S. at 695.

Petitioners argue—as they must in light of *Miller* and similar cases—that members of the news media are entitled to notice of third party subpoenas because they enjoy special First Amendment rights. We believe this Court rejected that contention in *Branzburg* when it refused to create a testimonial privilege for newsmen. In part its refusal was based on the practical and conceptual difficulties of administering the proposed privilege, but is was also prompted by a belief that it would be constitutionally

400 U.S. 517, 530 (1971) (expressly approving the holding in *Cole*). *See also* the other authorities collected in the majority opinion below at App. 21a nn.39, 40.

[13]Petitioners assume the notice remedy is the only means available to preclude the possibility that government officials will abuse lawful process to discover the identity of their sources. But if a government official does, indeed, violate a reporter's civil rights that official can be sued for damages. *See Bivens v. Six Unknown Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). We think, as did the court below, App. at 76a, that the prospect of such actions is itself a powerful deterrent against the kind of abusive conduct petitioners fear.

inappropriate to single out any particular group for special treatment under the First Amendment.[14]

It is certainly true, as the Court observed, that "newsgathering is not without its First Amendment protections," 408 U.S. at 707, but it is equally true that these protections apply to all citizens who may need them and not just to journalists. Petitioners do not contend that all citizens are entitled to notice of third party subpoenas, because this would expose the central weakness of their claim. The law is clear that ordinary citizens are not entitled to notice of third party subpoenas as a matter of constitutional right. *Branzburg* makes it equally clear that plaintiffs, as members of the news media, enjoy no special status which would give them a claim to preferential treatment under the First Amendment.

Zurcher v. Stanford Daily, supra, disposes of any doubts in this regard. That case involved a civil rights action claiming deprivation of First and Fourth Amendment rights resulting from search of a newspaper office pursuant to a valid warrant. The *Zurcher* plaintiffs had, of course,

[14]Thus, the Court stated that any attempt to define the categories of persons who would be entitled to claim the privilege would be a

> questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or mimeograph just as much as of the large metropolitan publisher who uses the latest photocomposition methods. 408 U.S. at 704.

Moreover, the Court said that any effort to distinguish real from "sham" journalists would "inevitably" lead to discrimination based on the content of expression, which itself would be constitutionally suspect. *Id.* at 705 n.40. This principle is consistent with other decisions holding that journalists have no greater First Amendment right of access to information than do members of the public generally. *Houchins v. KQED, Inc.,* ____ U.S. ____, 98 S.Ct. 2588, 2591-96, 2598 (1978); *Saxbe v. Washington Post,* 417 U.S. 843, 849-50 (1974); *Pell v. Procunier,* 417 U.S. 817, 833-34 (1974); *Zemel v. Rusk,* 381 U.S. 1, 17 (1965).

received the benefits of prior judicial scrutiny when the magistrate found there was probable cause to issue the warrant, but they argued this protection was insufficient because it gave them no opportunity to oppose issuance at the hearing before the magistrate. This Court rejected that claim.[15]

The *Zurcher* plaintiffs' basic premise was that, except in compelling circumstances, subpoenas *duces tecum* and not search warrants should be used to obtain evidence from persons not then suspected of crime. The Court concluded this broad argument must fail, both because "there is no direct authority in this or any other federal court for [such a] sweeping revision of the Fourth Amendment," 98 S.Ct. at 1975, and because

> [t]he Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by . . . . insisting that the investigation proceed by subpoena *duces tecum*. . . . *Id.* at 1978.

Having rejected plaintiffs' basic premise, which applies equally to all persons who may possess evidence relevant to a criminal investigation, the Court then turned to plaintiffs' narrower argument that the First Amendment required a different result when the evidence is located in a newspaper office. Although the *Zurcher* plaintiffs urged that use of search warrants might cause confidential sources to dry up

[15]Petitioners' position resembles that of the *Zurcher* plaintiffs in that both seek to assure prior judicial scrutiny in an *adversary hearing* before government investigators obtain access to information concerning a journalist's newsgathering functions. Petition at 15. But petitioners go further than the *Zurcher* plaintiffs: they say that no subpoena for third party records relating to a journalist should issue without an adversary hearing. Prior judicial review, *ex parte* or otherwise, has never been required for third party subpoenas.

and otherwise interfere with the collection and dissemination of news, the Court nonetheless declined

> to reinterpret the [Fourth] Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, *or to demand prior notice and hearing in connection with the issuance of search warrants. Id.* at 1983 (emphasis supplied).

In a concurring opinion, Mr. Justice Powell made clear that the majority's views rested soundly on the principle previously established in *Branzburg*. He said,

> there is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press, as to every other persons.**** There is no authority either in history or the Constitution itself for exempting certain classes of persons or entities from its reach. *Id.* at 1984.[16]

Petitioners' basic premise here is that special rules apply when government investigators seek information about criminal conduct which is known to, or may be in the possession of, members of the news media. *Zurcher* follows *Branzburg* in rejecting this assumption. And we think both decisions flatly contradict petitioners' assertion that *Miller* "left open" the possibility of a different conclusion when the same information is sought from third parties.

[16]Inexplicably, petitioners insist that Mr. Justice Powell's concurring opinions in *Branzburg* and *Zurcher* support their claim that notice is required to assure judicial oversight before government officials can employ the usual procedures prescribed for investigating crimes when the press is the source of the information being sought. Petition at 13-14. But Mr. Justice Powell himself explained in *Zurcher* that his concurrence in *Branzburg* "does not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment." 98 S.Ct. at 1984 n.3.

The footnote on which petitioners rely merely observes that there may be occasions when a person might have standing to prevent government investigators from obtaining evidence from a third party source if the methods used infringed a recognized First Amendment right. *United States v. Miller*, 425 U.S. at 444 n.6. But the cases cited show that the footnote refers to rights of association, not to an asserted right to keep confidential news sources secret.[17] When *Branzburg* declined to create a newsman's testimonial privilege, the Court expressly refused to follow such associational rights cases as *NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Alabama*, 357 U.S. 449 (1958); *see Branzburg v. Hayes*, 408 U.S. at 699-700; there is thus no reason to assume a reporter claiming the right to protect confidential sources would have standing to contest a third party subpoena. Moreover, there is nothing in *Miller* to suggest that a party having *standing* to challenge a third party subpoena would be entitled to *notice* when the subpoena issues.[18]

[17]The *Miller* footnote refers to *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); to *Buckley v. Valeo*, 424 U.S. 1, 60-82 (1976); and to Mr. Justice Powell's concurring opinion in *California Bankers Association v. Shultz*, 416 U.S. 21, 78-79 (1974). The referenced passages in *Buckley* and *Shultz* deal with record keeping and reporting requirements which could interfere with rights of privacy and rights of association. *Eastland*, too, is concerned with associational rights.

[18]Indeed, the last sentence of the *Miller* footnote observes that the Government had "exercised its powers through narrowly directed subpoenas *duces tecum* subject to the legal restraints attendant to such process." 425 U.S. at 444 n.6. Elsewhere in the opinion, the Court rejected the contention that

> greater judicial scrutiny, equivalent to that required for a search warrant, is necessary when a subpoena is to be used to obtain bank records of a depositor's account. *Id.* at 446.

It is evident that the kinds of "legal restraints" to which the Court referred did not include prior judicial review of the appropriateness of a third party subpoena. And even if search warrant standards did apply to such subpoenas, *Zurcher* makes clear there would be no requirement of prior notice before the "warrant" issued.

In sum, neither *Branzburg*, nor *Zurcher*, nor *Miller* supports petitioners' claim that a reporter's interest in maintaining confidentiality of news sources justifies the remedy of advance notice of third party subpoenas. To the contrary, we believe these decisions foreclose further consideration of petitioners' attempt to replace the usual procedures contemplated by the Fourth Amendment with special rules applicable only to the press.[19]

II. THE ISSUE PETITIONERS PRESENT IS NOT APPROPRIATE FOR JUDICIAL RESOLUTION.

Petitioners understandably perceive their case in terms of the First Amendment, because their primary interest is to develop new constitutional remedies to protect confidential information relating to their newsgathering activities. But the problem they address is not confined to the area of First Amendment freedoms, any more than it is the exclusive concern of journalists. All citizens have an interest in preserving the confidentiality of the information about their financial transactions, communications, travel, and other personal activities which appears in third party business records. The question is whether the Constitution gives that privacy interest greater weight than the competing societal interest in obtaining information relevant to suspected crimes.

This Court held in *Miller* that the Fourth Amendment does not apply to third party business records, just as it refused in *Branzburg* and *Zurcher* to allow either generalized privacy or specialized First Amendment claims

[19]Cases such as *Carroll v. Princess Anne*, 393 U.S. 175 (1968); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); and *Marcus v. Search Warrants*, 367 U.S. 717 (1961), do not assist petitioners; these cases involve prior restraints on free expression, not an alleged infringement of newsgathering activities. This Court has twice stated that restraints on newsgathering cannot be analogized to prior restraints on publication. *See Zurcher v. Stanford Daily*, 98 S.Ct. at 1982; *Branzburg v. Hayes*, 408 U.S. at 680-81.

to displace customary investigatory procedures sanctioned by the Fourth Amendment. But the Court has also been careful to stress that its decisions do not "prevent or advise against legislative or executive efforts to establish non-constitutional protections" against possible abuses of otherwise lawful investigatory methods. *Zurcher v. Stanford Daily*, 98 S.Ct. at 1983; *see also Branzburg v. Hayes*, 408 U.S. at 706-07. Recent developments show the Congress has been alert to supply these additional protections when it concludes they are needed.

In 1976, the Congress adopted legislation which requires the IRS to give notice to customers when it issues summonses for records of the customers' transactions with third party recordkeepers, such as financial institutions, credit card issuers, brokers, attorneys and accountants. Telephone companies, as credit card issuers, are third party recordkeepers within the meaning of the statute, and IRS summonses for toll billing records are subject to its provisions.[20] On November 10, 1978, the President signed a new law which requires all federal government agencies to give notice when seeking access to customer records maintained by federally supervised financial institutions.[21] The Congress is also actively considering proposals to extend the same protection to a wide variety of other third party business records, including those maintained by telephone companies.[22] These existing and proposed rules apply to all

[20] *See* Section 1205 of the Tax Reform Act of 1976, Pub. L. 94-455, inserting a new Section 7609 into the Internal Revenue Code of 1954, 27 U.S.C. §7609. Enactment of this statute should prevent recurrence of the incident involving David Rosenbaum which is described in the Petition at 7-8.

[21] *See* The Right To Financial Privacy Act of 1978, enacted as Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub.L. 95-630.

[22] *See, e.g.*, H.R. 214, 95th Cong., 1st Sess. (1977), introduced by Congressman Kastenmeier; H.R. 215, 95th Cong., 1st Sess. (1977), introduced by Congressman Whalen; S.14, 95th Cong., 1st Sess. (1977), introduced by Senator Mathias. These proposals apply to financial records, telephone toll billing records and credit records in the possession of communications common carriers, and to similar records maintained by financial institutions, credit card issuers and consumer reporting agencies. They provide, in general, that government employees cannot obtain access to these records except pursuant to administrative or judicial subpoenas or search warrants; that customers must in all instances be given advance notice by the government of all administrative subpoenas; that the same requirement applies to judicial subpoenas unless a court finds that deferment of notice is justified under specified conditions; and that the customer must be afforded at least 18 days in which to move to quash any subpoena as to which notice is required to be given.

customers, not to any special class, and they make no exceptions for the press when departures from the notice requirements are authorized.

Petitioners ask this Court to pretermit the legislative process and fashion a special constitutional remedy when subpoenas are used to obtain third party business records relating to members of the news media. We believe they have failed to advance any reason to justify the extraordinary judicial intervention they seek. Whether a notice remedy should be developed to guard against the possibility of improper use of third party subpoenas by federal investigators — who should give the notice and who should be entitled under what circumstances to receive it — is, we submit, far better left for determination by the Congress. It is not a matter which this Court should undertake to decide on this record at the instance of these litigants.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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